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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PARK PLACE ASSOCIATES, LTD. et al., Plaintiffs and Respondents, v. THE BELL GARDENS BICYCLE CLUB et al., Defendants and Appellants.	B173442 (Los Angeles County Super. Ct. No. VS011975)

APPEAL from an order of the Superior Court for the County of Los Angeles, Brian F. Gasdia, Judge. Reversed.

Baker, Keener & Nahra, Robert C. Baker, Melissa S. Fink, E. Todd Trumper and Laurence C. Osborn for Defendants and Appellants.

Ferruzzo & Worthe, James J. Ferruzzo and John R. Pelle for Plaintiffs and Respondents.

This dispute arises out of a capital call issued by LCP Associates, Ltd., the majority owner of The Bell Gardens Bicycle Club, a joint venture (Bicycle Casino), to the minority owner Park Place Associates, Ltd. for capital improvements to the Bicycle Casino and construction of a hotel on casino property. Park Place initiated arbitration proceedings alleging the capital call violated the parties' joint venture agreement. It also filed a petition for a preliminary injunction in the superior court.

On January 15, 2004 the trial court enjoined LCP from proceeding with the capital call, imposing a penalty on Park Place for refusing to comply with the capital call or taking any action to proceed with plans for renovations of the Bicycle Casino or the construction of a hotel. Because Park Place did not establish it would suffer irreparable injury in the absence of interim injunctive relief, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On December 29, 2003 LCP sent a letter to Park Place's limited partners demanding that Park Place contribute capital to the Bicycle Casino pursuant to the parties' joint venture agreement. The letter explained the Bicycle Casino was in need of "nearly $18,000,000 of improvements, including $6,000,000 for a new hotel facility" and repairs and upgrades to the existing facility's roof and kitchen. The capital call specified Park Place's share of the $7 million capital call as $1.55 million, based on its pro rata interest in the Bicycle Casino.

On January 14, 2004 Park Place demanded arbitration, in accordance with the terms of the joint venture agreement, asserting that the capital call and the planned renovations violated the joint venture agreement. On January 15, 2004 Park Place filed a petition for injunctive relief and application for a temporary restraining order in the superior court. The petition alleged that the capital call violated the joint venture agreement and sought an injunction prohibiting LCP from proceeding with either the capital call or the proposed renovations to the property. The court granted a temporary restraining order and set a hearing on an order to show cause regarding the preliminary injunction for February 6, 2004.

After further briefing and oral argument, the trial court granted Park Place's petition for a preliminary injunction. The order enjoined LCP from proceeding with the capital call and entering into any contracts for capital improvements or expenses "that are not otherwise within the normal course of business" of the Bicycle Casino until the arbitration was completed.

DISCUSSION

1. *Standard of Review*

"As its name suggests, a *preliminary* injunction is an order that is sought by a plaintiff *prior to a full adjudication of the merits of its claim.* [Citation.] To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) "In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.)

We review the trial court's ruling for abuse of discretion. (*Whyte v. Schlage Lock Co*. (2002) 101 Cal.App.4th 1443, 1449-1450.) The general rule is that an order *denying* an application for a preliminary injunction may be reversed only if the trial court abused its discretion with respect to *both* the question of success on the merits and the question of irreparable harm. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286-287.) When the trial court has *issued* a preliminary injunction, however, its order must be reversed if it abused its discretion in evaluating the presence of irreparable harm, regardless of the likelihood the moving party will prevail on the merits, because evidence of some irreparable injury or interim harm if an injunction is not issued pending an adjudication of the merits is an indispensable requirement for issuance of a preliminary injunction. (*White v. Davis, supra,* 30 Cal.4th at p. 554; see *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 526.)

2. *Park Place Failed to Present Any Evidence of Irreparable Injury*

This case is all about money. Although Park Place argues the preliminary injunction is necessary to preserve the status quo pending the outcome of the parties' arbitration, it has not presented any evidence to suggest it is unable to pay the capital call or faces any injury that is not compensable in damages if LCP proceeds with the planned renovations during the arbitration proceedings.

The joint venture owns and operates a business. If the arbitrator ultimately finds that LCP's proposed actions are in breach of the joint venture agreement, LCP will be required to pay money damages to the extent those actions have diminished the value of Park Place's ownership interest. Park Place and its partners will not suffer any injury, let alone irreparable injury.

Park Place's claim that such damages will not be ascertainable is supported only by ipse dixit, not evidence.[1] And there is no suggestion LCP is insolvent or unable to pay any damages that might ultimately be awarded. To the contrary, the Bicycle Casino generates substantial cash flow that should be more than sufficient to repay any losses suffered by Park Place. Accordingly, preliminary injunctive relief was improper. (*West Coast Constr. Co. v. Oceano Sanitary Dist.* (1971) 17 Cal.App.3d 693, 700 ["mere monetary loss is not irreparable in contemplation of the remedy of injunction unless there is an averment or a showing that parties causing the loss are insolvent or in any manner unable to respond in damages"]; see *Simms v. NPCK Enterprises, Inc*. (2003) 109

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[1] In *Wind v. Herbert* (1960) 186 Cal.App.2d 276, the Court of Appeal affirmed the trial court's issuance of a preliminary injunction to prevent a card club partner from breaching the partnership agreement by depositing club monies into a bank account not accessible to the other partners. In *Wind*, however, the trial court's implied finding that money damages would not be ascertainable was supported by substantial evidence in the record. (*Id.* at pp. 284-285.) Such is not the case in the present matter. (See Code Civ. Proc., § 526, subd. (b)(5) ["An injunction cannot be granted . . . To prevent the breach of a contract the performance of which would not be specifically enforced"].)

Cal.App.4th 233, 243 ["The existence of another effective judicial remedy is grounds for denying injunctive relief."].)[2]

Richards v. Dower (1883) 64 Cal. 62, in which the Supreme Court held the defendant's planned construction of a tunnel under the plaintiff's land was irreparable injury per se, is not to the contrary. In *Richards* the plaintiff had asserted a cause of action for trespass, and the court held "the tunnel which the defendant is constructing through the plaintiff's land is of a permanent character. It disturbs the plaintiff's possession, and if permitted to continue will ripen into an easement. That of itself is sufficient to entitle him to an injunction." (*Id.* at p. 64.) In the present case, by contrast, LCP owns a majority interest in the land it wishes to develop; and its planned construction would not deprive Park Place of any right of possession.[3]

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[2] The trial court appears to have believed an actual showing of irreparable injury was unnecessary in a case involving real property: "I'm to decide is there a reasonable likelihood they'll prevail on the merits. That's one prong. Pecuniary compensation being ineffective is the other prong. And when it's dealing with real estate, it's always pecuniary compensation is not sufficient." It is, of course, true that "courts of equity have established the . . . rule that in general the legal remedy of damages is inadequate in all agreements for the sale or letting of land . . . ." (*Morrison v. Land* (1915) 169 Cal. 580, 586-587; accord, *Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822, 830.) Although the proper use of the real estate jointly owned by the parties is an issue in the present case, the dispute is not one involving an agreement "for the sale or letting of land." (See *Zellner v. Wassman* (1920) 184 Cal. 80, 84 [equitable relief is improper when "an ordinary action at law for breach of the contract would bring him the very thing to which he is entitled under the allegations of his complaint"].)

[3] Park Place also asserts that, if LCP is permitted to proceed with its plans for renovating the Bicycle Casino and improving the property and Park Place is ultimately found by the arbitrator to be responsible for the capital call plus penalties, many of its limited partners would "suffer devastating losses to their income." While this may be true, if the arbitrators find the capital call to be proper, any income losses to Park Place and its limited partners will be the result of their assertion of a nonmeritorious litigation position, not any wrongdoing by LCP.

3. *The Pending Arbitration Does Not Support a Preliminary Injunction*

Park Place also contends it will suffer irreparable harm in the absence of an injunction because permitting LCP to proceed with the capital call would render the pending arbitration proceedings a "hollow formality." (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley* (4th Cir. 1985) 756 F.2d 1048, 1053-1054.) It therefore insists the trial court's order was proper pursuant to Code of Civil Procedure section 1281.8, subdivision (b),[4] which provides, "A party to an arbitration agreement may file in the court in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not commenced, in any proper court, an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief. . . ."[5]

A pending arbitration proceeding, without more, does not demonstrate irreparable injury or substitute for the required showing of irreparable interim injury. Indeed, in deciding whether to issue an injunction pursuant to section 1281.8, the trial court must still weigh the same factors it considers in proceeding under section 526: (1) likelihood of success on the merits, and (2) whether the moving party will suffer irreparable harm in the interim if the injunction is not issued. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420-1421.) Interim injunctive relief under section 1281.8, therefore, is appropriate only if the applicant "has no adequate alternative

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[4] Statutory references are to the Code of Civil Procedure.

[5] Although the trial court did not cite section 1281.8 in its order, it appears to have accepted Park Place's contention. At the hearing, the court cited section 526, subdivision (a)(3), which provides for preliminary injunctive relief, "When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual." The court stated, "that's precisely the grounds of the injunction they're requesting, is if this is going to be decided by an arbitrator."

remedy, and will suffer irreparable harm if the injunction is denied." (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 450.) Where, as here, any interim harm is solely monetary and can be addressed in the ultimate arbitration award, injunctive relief is not available. (*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp*. (1967) 255 Cal.App.2d 300, 306 ["Generally, where damages afford an adequate remedy by way of compensation for breach of contract, equitable relief will be denied"].)

DISPOSITION

The order granting a preliminary injunction is reversed. LCP is to recover its costs on appeal.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.